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No. 119

IN THE

Supreme Court of the United States

OCTOBER TERM 1968

THOMAS KAPATOS,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

REPLY OF PETITIONER TO GOVERNMENT'S MEMORANDUM

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The government is content that the law as set out in petitioner's brief is controlling, as the government neither distinguishes any cases nor cites any itself.

The government is content to suggest that the cases are not applicable because there was no suppression of evidence favorable to the defense.

Yet, it admits—as it must—that the government did not supply the name of John T. Joyce who did possess evidence favorable to the petitioner and contrary to the government's theory of the case.

The government states (G. Br. 4) that the attorney for petitioner, Mr. Lopez, acknowledged that he had seen John T. Joyce's name on the New York Police Department record turned over to him during trial. We set out at p. 12 of our Petition, Joyce's statement to the New York police which was given to counsel before trial, and we pointed out that there was lacking in that statement the crucial information which was contained in Joyce's later statement to the F.B.I., *which statement was not given to defense counsel.* The F.B.I. statements made by Joyce contained the crucial information, not divulged to defense counsel that the policeman-bandit who originally alighted from the truck, and the policeman-bandit who tried to start the station wagon were one and the same man. That important piece of evidence, which may have persuaded the jury to vote otherwise than guilty, was withheld from defense counsel—inadvertently, according to the government, but withheld to the prejudice of the petitioner nonetheless.

It is the government's theory that petitioner is to be punished because his lawyer failed to follow up false leads and should have been more imaginative in guessing the government's theory of the case beforehand.

The fact remains—and it is not contravened by the government—that the evidence which could have been given by John T. Joyce was material and relevant to the de-

fense in proving that petitioner could not have been one of the holdup men and that the F.B.I. had statements from John T. Joyce favorable to the petitioner. Although given a list of other names of possible witnesses, the government "inadvertently" failed to supply the name of John T. Joyce and defense counsel's failure to smell him out from a reading of the Life Magazine article is now claimed by the government to excuse the prosecution's dereliction of its duty to see that defendant receives a fair trial.

Such concept is not in accord with the cases cited in the petition or in accord with the concepts in the following articles: Brennan, *The Criminal Prosecution: Sporting Event or Quest for Truth,* 1963 Wash. U.L.Q. 279; *The Duty of the Prosecutor to Disclose Exculpatory Evidence,* see note, 60 Colum. L.Rev. 858 (1960); *Prosecutor Held to Have Duty to Disclose Material Exculpatory Evidence Without Prior Defense Request,* see Comment, 39 N.Y.U.L.Rev. 565 (1964).

We respectfully submit that even if the failure to submit the name of John T. Joyce was not deliberate, the withholding of Joyce's F.B.I. statement which contained evidence disproving the government's theory should authorize a new trial.

Respectfully submitted,

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